Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

LYNETTE HINSHAW,
Petitioner,

v.

GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTINA DEVON MAHLER, Deceased,
Respondents,

and

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION,
Intervenor/Respondent.

Petition for Writ Of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Lon J. Dale
MILODRAGOVICH, DALE,
STEINBRENNER & BINNEY, P.C.
P.O. Box 4947
Missoula, Montana 59806-4947
(406) 728-1455
Attorney for Petitioner

11 6 PP

QUESTIONS PRESENTED

The questions presented for the review of the Court are as follows:

1. Did the Ninth Circuit abrogate case law [Montana v. U.S., 450 U.S. 544, 564-65 (1981) and National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855-56 (1985)] concerning imposition of tribal court adjudicatory civil jurisdiction over non-Indians by relying upon dicta in Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 18 (1987), already placed in question in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, at 247 n.10 (1989), to impose civil adjudicatory jurisdiction over a non-Indian.

2. Did the Ninth Circuit err in allowing a tribal court civil adjudicatory jurisdiction over a survivorship

tort claim involving a non-Indian and the estate of a non-Indian, premised upon a supplemental jurisdiction concept, when tribal adjudicatory jurisdiction was non-existent?

LIST OF ALL PARTIES TO THE PROCEEDING

The names of the parties are set forth in the caption of the case.

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Petition for Writ Of Certiorari To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Lynette Hinshaw, the petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered on June 17, 1994.

OPINIONS BELOW

The July 11, 1989, Order of the Tribal Court of the Confederated Salish and Kootenai Tribes is reprinted in Appendix A to this petition. (Unpublished opinion.) The February 2, 1990, Appellate Opinion of the Appellate Court of the Confederated Salish and Kootenai Tribes of the Flathead Tribes, Pablo, Montana, affirming the Tribal Court is reprinted in Appendix B to this petition. (Unpublished opinion.) The January 29, 1993, Opinion and Order of the United States District Court for the District of Montana, Missoula Division,

is reprinted in Appendix C to this petition. (Unpublished opinion.) The June 17, 1994, Memorandum of the United States Court of Appeals for the Ninth Circuit affirming the District Court decision is reprinted in Appendix D to this petition and, at the filing of this petition, is an unpublished opinion.

JURISDICTIONAL STATEMENT

The judgment of the Ninth Circuit Court of Appeals was entered on June 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case does not involve any constitutional and statutory provisions. The extent of tribal courts' jurisdiction over non-Indians on reservations has been defined by case law.

STATEMENT OF THE CASE

Course of Proceedings

In June of 1988, the Mahlers brought wrongful death and survivorship claims against Lynette Hinshaw (hereinafter "Hinshaw") in the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation [hereinafter Tribal Court]. Hinshaw appeared in the action solely to contest Tribal Court jurisdiction in the matter. Hinshaw contested tribal jurisdiction on the grounds that the cause of action arose out of an accident in which no tribal members were involved. Both the Tribal Court (Appendix A) and the Tribal Appellate Court (Appendix B) ruled that the Tribal Court had jurisdiction over the case.

Having exhausted her tribal

remedies, Hinshaw moved the Tribal Court to stay the proceedings therein, until such time as a review of Tribal Court jurisdiction could be made by the United States District Court. The motion was granted.

Basis for Federal Jurisdiction

The basis of the United States District Court's jurisdiction over this matter was premised on 28 U.S.C. § 1331, providing original federal district court jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. The question whether an Indian tribe retains the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court must be answered by reference to federal law and is a federal question under § 1331. National Farmers Union Insurance Cos. v. The Crow Tribe of

Indians, 471 U.S. 845, 852 (1985).

On January 29, 1993, District Judge Lovell issued his Order, which concluded that: (1) Hinshaw complied with the requirement of exhausting her Tribal Court remedies; (2) the Tribal Court has jurisdiction over the wrongful death and survivor claims; and (3) the Tribal Court has personal jurisdiction over Hinshaw. (See Appendix C.)

On June 17, 1994, the United States Court of Appeals affirmed the decision of the United States District Court. (See Appendix D.)

REASONS FOR GRANTING THE PETITION

1. This Court's holdings in National Farmers Union and Montana regarding the applicable standard of review for the assertion of tribal jurisdiction were circumvented in the lower court by presumption language lifted from dicta in Iowa Mutual.

The authority established by this Court espouses that Tribal Courts have limited civil jurisdiction over non-Indians on the reservation. Montana v. U.S., 450 U.S. 544 (1981), National Farmers Union v. Crow Tribe, 471 U.S. 845 (1995). Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the reservations. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. Montana, id. at 544, citing Williams v. Lee, 358 U.S. 217, 223 (1959), Morris v. Hitchcock, 194 U.S. 384 (1904), Buster v. Wright, 135 F. 947, 950 (CA8 1905).

In Montana this Court determined

that Indian tribes had power to punish tribal offenders and retain their inherent power to determine tribal membership, to regulate domestic relationships among members, and to prescribe rules of inheritance for members. Id. at 564. However, the exercise of tribal power beyond what was necessary to protect tribal self-government or to control internal relations was determined to be inconsistent with the independent status of the tribes and, therefore, could not survive without express congressional delegation. Montana, id. at 564 (citations omitted). In Montana this Court determined that a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians within its reservation when that conduct threatens or has some direct effect on

the political integrity, economic security, or health and welfare of the tribe. Id. at 566. (Citations omitted.)

The concept established by the Montana decision was reiterated by the subsequent decision of National Farmers Union Cos. v. Crow Tribe, id.

In National Farmers Union, this Court repeated the necessity of intrusion into tribal sovereignty as a prerequisite for Tribal Courts to acquire adjudicatory jurisdiction over non-Indians.

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers Ins. Cos. v. Crow Tribe, 471 U.S. 845, 855-56 (1985).

In National Farmers Union, this Court was unable to provide the lower courts with an example of the required "careful analysis." The reason was that the Court also held that the lower courts had not satisfied the "exhaustion requirement" under which all tribal remedies must be exhausted on the jurisdictional issues before the assertion of tribal jurisdiction can be reviewed by a federal court. Id. at 857. This Court therefore remanded the National Farmers Union litigation for further proceedings and stayed any specific inquiry into the jurisdictional issues presented in the case.

Lower courts have relied on the authority of National Farmers Union to refer all initial considerations on matters of tribal jurisdiction to the Tribal Courts. E.g., United States v.

Plainbull, 947 F.2d 724, 728 (9th Cir. 1992); Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991); Burlington Northern R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1244 (9th Cir. 1991); Native Village of Venetie I.R.A. Council v. Alaska, 918 F.2d 797 (9th Cir. 1990), reh'g denied, 944 F.2d 548 (9th Cir. 1991).

However, lower courts have been uncertain as to the applicability of National Farmers Union since this Court's decision in Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987), when this Court stated in dicta:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities **presumptively lies in the tribal courts** unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mutual, 480 U.S. 9, at 18 (citations omitted) (emphasis added).

In light of the language of presumption noted in Iowa Mutual, the lower courts now require specific guidance on the parameters of the "careful examination" to be conducted **after** the exhaustion of tribal remedies.

This Court has offered no decisions since National Farmers Union as to the applicability of the "careful analysis." The question of whether a presumption of jurisdiction of any nature exists is questionable.

> The Yakima Nation's reliance on statements about retained tribal sovereignty in National Farmers Union Ins. Cos. v. Crow Tribe, 471 U. S. 845 (1985), and Iowa Mutual Ins. Co. v. LaPlante, 480 U. S. 9 (1987), is likewise misplaced. In neither of those cases did the Court decide whether the Indian Tribe had authority over the nonmembers involved. Instead, the Court established an exhaustion rule, allowing the

> tribal courts initially to determine whether they have jurisdiction, and left open the possibility that the exercise of jurisdiction could be later challenged in federal court. See 471 U. S., at 856-857; 480 U. S., at 16, 19.

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, at 247 n.10 (1989).

The Tribal Court, Tribal Appellate Court, U.S. District Court, and the Ninth Circuit Court have departed from the accepted and usual course of proceeding by failing to apply the Brendale holding and continuing to use the Iowa Mutual presumption approach to tribal adjudicatory jurisdiction. In the decision of the lower court in this litigation, there is no discussion of how tribal sovereignty, *i.e.*, self-governing capability, is affected to the extent that the Montana and National Farmers Union decisions require the Tribal Court

to assume jurisdiction over a non-Indian to ensure its sovereign existence.

With respect to tort claims involving non-Indians, the lower courts have no specific guidance as to the parameters of the Tribal Court adjudicatory jurisdiction. There is a profound need for this Court to reconcile the National Farmers Union and Iowa Mutual decisions by deciding: 1) whether the language of presumption in Iowa Mutual effectively overrides the standard of review prescribed by National Farmers Union; 2) if the presumption is found to be the dicta as was indicated to be in Brendale, then there must be a specific determination as to the application of the Montana and National Farmers Union criteria to the question of civil tort jurisdiction of Tribal Courts over non-Indians found on the reservation. The

case at bar presents a fact scenario which requires resolution by means of just such a careful examination of tribal sovereignty.

The lower courts have also inappropriately cited the Montana Supreme Court decision of Larrivee v. Morigeau, 188 Mont. 187, 602 P.2d 563 (1979), cert. denied, 445 U.S. 964 (1979), as authority for the proposition that tribal courts have current jurisdiction over non-Indians. Larrivee involved two Indian parties. The issue was whether Montana state courts had jurisdiction over the Indian defendant. Larrivee is not applicable as authority for the converse, *i.e.*, jurisdiction of the Tribal Court over non-Indians. The Montana and National Farmers Union decisions occurred subsequent to Larrivee and are the applicable law as to tribal adjudicatory

jurisdiction over non-Indians. Larrivee is no authority whatsoever for tribal adjudicatory jurisdiction over non-Indians. It was a departure from accepted proceeding for all of the lower courts to utilize Larrivee as a part of their reasoning in granting jurisdiction over a non-Indian.

2. By improperly relying on a kind of supplemental jurisdiction the District Court and the Court of Appeals erred in their disposition of the survivorship claim.

Hinshaw contends that the survivorship claim properly lies in state court because it is an action by the estate of a non-Indian against another non-Indian which cannot impair the sovereignty of the Tribal Court.

The District Court declined to reach the question whether the Tribal Court would have jurisdiction over the survivorship if it had been presented

alone. (Appendix C-25.) Rather than address this preliminary matter, the District Court held that "[t]ribal sovereignty and judicial economy necessitate the conclusion that subject matter jurisdiction over the entire action, including both the wrongful death and survivorship claims, lies in tribal court . . . . " This position was upheld by the Court of Appeals. (Appendix D-7.)

In so ruling, the lower courts have awarded the Tribal Court jurisdiction comparable to supplemental jurisdiction over the survivorship claim. Subject matter jurisdiction is a prerequisite for adjudicatory jurisdiction of any court. See Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1979). Indeed, supplemental jurisdiction (formerly known as ancillary or pendent jurisdiction) only arises in the federal courts by

means of special legislation. The exercise of supplemental jurisdiction by the federal courts is governed by 28 U.S.C. § 1367 (Supp. 1990). The statute, in pertinent part, provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (Supp. 1990).

Supplemental jurisdiction is a creature of and applies only to federal courts. The statute does not address Tribal Court jurisdiction, nor does it prescribe any means by which courts not regulated by Congress may assume "supplemental" jurisdiction. No reported

decisions extend adjudication jurisdiction of Tribal Courts over non-jurisdictional matters based upon a concept of supplemental jurisdiction. The National Farmers Union and Montana standards premised upon tribal sovereignty remain as prerequisites for tribal adjudicatory jurisdiction over non-Indians.

Under the holdings of the District Court and Court of Appeals, an Indian plaintiff is allowed to sue a non-Indian defendant in Tribal Court in a matter over which the Tribal Court lacks jurisdiction, merely by joining the action with another in which the tribe is concluded to have jurisdiction. The Court has decreed that when tribal jurisdiction is challenged under such circumstances, a "careful examination of tribal sovereignty" must be conducted.

National Farmers Union, at 855-56. The lower courts have declined to conduct the National Farmers Union analysis and instead, without any authority, supplied the tribal court with adjudicatory jurisdiction over the survivorship portion of the litigation that is clearly subject only to State of Montana jurisdiction. The Courts' reasoning, based only on efficiency concerns, was improper; where there is no jurisdiction, a court cannot hear a claim, regardless of "efficiency."

The survivorship action is brought in a representative capacity by the personal representative of the estate of a non-Indian against another non-Indian. The issues involved are not tribal issues because the damages are only attributable to non-Indians and do not involve any tribal matter. Moreover, the issues do

not challenge or potentially impair tribal sovereignty, involve any direct effect on the political integrity, economic security, or health or welfare of the Tribes as required by Montana v. U.S., 450 U.S. 544, at 566 (1981), and National Farmers Union at 855-56.

In their decisions, the lower courts stated concerns about limitations on tribal sovereignty and undermining the authority of the tribal court. The Montana and National Farmers Union prerequisites for tribal adjudicatory jurisdiction remain intact. How can state court jurisdiction over the survival claim impair tribal sovereignty? Undue deference to tribal courts as warned of is the result. Iowa Mutual, 480 U.S. at 21 (Stevens, J., concurring in part and dissenting in part). Thus, if the Court finds that tribal court

jurisdiction over the survivorship action lies beyond "the outer boundaries of an Indian Tribe's power over non-Indians," National Farmers Union, 471 U.S. at 851, then such a finding provides a legitimate limit on tribal sovereignty.

Without an effect on tribal sovereignty, no jurisdiction exists over either the wrongful death or survivorship actions against a non-Indian defendant. The wrongful death action is confused by a personal claim for non-injury consortium damages by the parents of the decedent. Neither of the plaintiff Mahlers were present at the accident scene. The traffic accident involved only non-Indians. The confusion of the wrongful death action is eliminated in the survivorship claim. Only estate claims exist in the survivorship litigation. No Indian claims, even

indirect consortium claims, exist. No possible sovereignty effect exists. No tribal adjudicatory jurisdiction exists over the survivorship claim, as the U.S. District Court plainly understood. (Appendix C-25, C-26.)

The failure of the courts below to conduct a "careful examination of tribal sovereignty" as required by National Farmers Union subjects this petitioner to the wrongful exercise of tribal court judicial power. The petition should be granted so that an appropriate judicial determination as to the interrelationship of the Montana, National Farmers Union, Iowa Mutual and Brendale decisions can be provided and the question of "supplemental jurisdiction" of tribal courts be resolved.

Innumerable individuals, insurance carriers, and their legal representatives

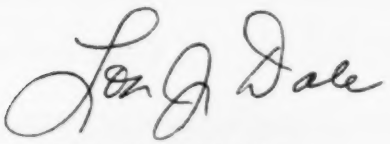
are daily involved in the difficult task of analysis of factual matters related to the parameters of civil tribal adjudicatory jurisdiction over non-Indians. There is no decision of this Court that charts the course as to limitations and guidelines for tribal courts exercising tribal adjudicatory jurisdiction over non-Indians. Tribal governments are all expansive, intent upon acquiring maximum political power. Tribal courts, as adjuncts of tribal government, render decisions allowing tribes to exercise civil jurisdiction over all entities within their reservations. This Court has decided that there are limits to tribal authority over non-Indians. Montana, id., National Farmers Union, id.; Brendale, id. However, the parameters of the tribal authority to regulate the civil affairs

of non-Indians involved in tort litigation remain mysterious and confusing.

CONCLUSION

The lower courts have departed from accepted case law and awarded a tribal court civil adjudicatory jurisdiction over a non-Indian in a controversy removed from an issue of tribal sovereignty. This Court is requested to grant the Petition for Certiorari and thoroughly review and define the parameters of tribal adjudicatory jurisdiction authority over non-Indians' noncontractual civil disputes emanating from conduct on reservations.

Respectfully submitted,



LON J. DALE
Counsel of Record
MILODRAGOVICH, DALE,
STEINBRENNER & BINNEY, P.C.
P.O. Box 4947
Missoula, Montana 59806-4947
(406) 728-1455
Attorneys for Petitioner

APPENDIX A:

ORDER OF

THE TRIBAL COURT OF THE

CONFEDERATED SALISH AND KOOTENAI

TRIBES

DATED JULY 11, 1989

IN THE TRIBAL COURT
OF THE CONFEDERATED SALISH AND
KOOTENAI TRIBES OF THE
FLATHEAD INDIAN RESERVATION

GLORIA S. MAHLER AND KENNETH J. MAHLER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF CHRISTIAN DEVON MAHLER, DECEASED. PLAINTIFFS. VS. LYNETTE HINSHAW, DEFENDANT.	O R D E R CAUSE NO. CV-2595-88

CASE MEMORANDUM

This matter came before the Court upon the filing of a Motion to Dismiss for lack of Personal jurisdiction by the

defendant, Lynette Hinshaw. The Plaintiffs' responded in opposition and a hearing was set to hear oral arguments on the 9th day of December, 1989. Both parties were present in court and represented by counsel.

The court, after having been fully advised in the matter now before it, makes the following findings:

1. That Gloria S. Mahler is an enrolled member of the Flathead Tribes;
2. That Kenneth J. Mahler is not an enrolled member of the Flathead Tribes but has submitted to the Jurisdiction of the Tribe by filing this action;
3. That Christian Devon Mahler, deceased, is not an enrolled member but is the descendant of an enrolled member;

4. That Lynette Hinshaw is not an enrolled member of the Flathead Tribe but resides within the exterior boundaries of the Flathead Indian Reservation at St. Ignatius, Mt.;

4. That the accident wherein the deceased died, occurred within the exterior boundaries of the Flathead Indian Reservation;

5. That the Confederated Salish and Kootenai Tribes have adopted broad jurisdiction over Civil matters arising within the exterior boundaries of the Flathead Indian Reservation. See: Paragraph 2 (a), § 1, Chapter 2, Law and Order Code.

6. That there is no Treaty or Federal Law limiting the ability of the Tribes to exercise civil jurisdiction over non-members

living or entering the Reservation for purposes of business, travel, residency or recreation;

DISCUSSION

The law upholding the ability of Indian tribes to exercise civil jurisdiction over non-members is clear and defined to the extent that leading Supreme Court cases have repeatedly ruled in favor of this exercise of civil jurisdiction. Iowa Mutual Insurance Company v. LaPlante, 107 S. Ct. 971 (1987); National Farmers Union Insurance Comps. v. Crow Tribe, 471 U.S. 845 (1985). Exercising Civil jurisdiction over persons found within the exterior boudaries of the Reservation is a Right that is supported by well-reasoned Tribal case law. See McDonald v. Racine, 15 I.L. Rep. 6013 (1988); Big Horse v. Confederated Salish and

Kootenai Tribes, et al, CV-1015-85. This jurisdictional power is boulstered by the fact that the Tribe has an interest in the health, safety and welfare of the their tribal members and their families while they are within the boundaries of the Reservation. This interest is further codified in tribal law and ordinances that reflect the desire to enforce laws protecting the Tribes and their members. See, for example, Resolution 85-188 and Chapter 1V of the Law and Order Code wherein the Tribes adopted and modified the Montana Traffic Code.

Subject matter jurisdiction over civil actions arising within the exterior boundaries of the Reservation is vested in the Tribal Courts by virtue of the Tribal Council passing laws that vest jurisdiction in the Court. This

jurisdictional grant directly affects the political integrity of the Tribe in that sovereign nations must have the ability to be self-determining by being able to regulate and adjudicate actions arising within the boundaries of their Nation.

In the case at Bar, the accident occurred within the boundaries of the Reservation on a highway that passes through the Reservation. The driver of one vehicle, the defendant, is a non-member residing with the Reservation; the driver of the other vehicle, a descendant of an enrolled member, was traveling on the highway passing through the Reservation. Jurisdiction over a cause of action arising out of the accident involving the defendant and the deceased lies exclusively with the Flathead Tribal Court. Personal

jurisdiction over the defendant also lies with the Tribal court because she resides within the exterior boundaries of the Flathead Reservation, and because she chooses to use the highway that runs through the Reservation. In a case such as this, it does not follow that on one hand the Tribe has jurisdiction over the subject matter but not the person. There can be no line drawing or distinction made between the ability of the Tribes to pass laws protecting all persons found within the exterior boundaries of the Reservation and the State of Montana passing laws to protect all citizens of the State, within the boundaries of the State. A member of the Tribes is subject to the jurisdiction of the State the instant he/she leaves the Reservation and the same premise would hold for non-members

entering the reservation, exlcuding criminal actions.

O R D E R

Therefore, it is hereby ordered, adjudged and decreed that the Confederated Salish and Kootenai Tribes have both subject matter and personal jurisdiction in this cause of action.

Dated this 11th day of July, 1989.

/s/ Bonnie Combes
BONNIE COMBES
Special Judge

APPENDIX B:

APPELLATE OPINION OF THE APPELLATE COURT OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD TRIBES, PABLO, MONTANA DATED FEBRUARY 2, 1990

IN THE APPELLATE COURT OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD TRIBES, PABLO, MONTANA

GLORIA S. MAHLER and KENNETH J. MAHLER, individually and as Personal Representatives of the ESTATE OF CHRISTIAN DAVON MAHLER, Deceased,	)	Cause No. CV-3595-88
Plaintiffs and Respondents,	)	APPELLATE OPINION
vs.	)	
LYNETTE HINSHAW,	)	
Defendant and Appellant.	)	

By Charles R. Hostnik, Associate Justice:

On January 26, 1990, the Appellate Court of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation convened in Pablo, Montana

to hear this appeal. The appeal proceeding was conducted pursuant to the provisions of the Law and Order Code of the Confederated Salish and Kootenai Indian Tribes of the Flathead Reservation, Montana (hereinafter "Law and Order Code"), Ch. I, Sec. 6. The matters before the Appellate Judges at that time were the briefs submitted by the parties, as well as a certified recording of the trial court proceedings. The Appellate Panel was composed of the Honorable Elbridge Coochise, Chief Justice; the Honorable Hollis Chough, Associate Justice; and the Honorable Charles Hostnik, Associate Justice.

I. BACKGROUND

On June 29, 1988, Plaintiffs filed a Complaint in the trial court of the Confederated Salish and Kootenai Tribes

of the Flathead Reservation for damages based upon a wrongful death claim and a survival claim. The Complaint alleged that on July 4, 1986, Christian Mahler, riding a motorcycle, was involved in an accident with an automobile driven by Defendant Lynette Hinshaw. Christian Mahler allegedly sustained injuries in that accident that led to his death.

The Plaintiffs (Respondents on appeal) are the parents of Christian Mahler. They commenced a probate action in Montana State Court to probate the estate of Christian Mahler. Plaintiffs were appointed co-personal representatives of Christian Mahler's estate in that State Court probate action.

Respondents then filed this action in Tribal Court. This action was commenced by Respondents in both their

individual capacities as well as in their capacities as co-personal representatives of the estate of Christian Mahler.

After the Complaint was filed, the Defendant (Appellant on appeal) entered an appearance to contest the Tribal Court's jurisdiction, prior to filing an Answer to the Complaint. Those jurisdictional arguments were raised in the form of a Motion to Dismiss. That motion was denied by the trial judge on July 11, 1989. This appeal followed.

II. ISSUES ON APPEAL

The issues presented on appeal relate solely to whether the Tribal Court has jurisdiction to hear this action. The Appellant contends, first, that the Tribal Court did not have subject matter jurisdiction over this action.

Second, she contends that if the Flathead Tribal Court does have subject matter jurisdiction, such jurisdiction is concurrent with the jurisdiction of the Montana State District Court. Since the probate action was commenced in State Court, Appellant argues this action should be heard by the State Court rather than this Tribal Court.

Finally, Appellant contends the Flathead Tribal Court does not have personal jurisdiction over her.

III. DOES THE FLATHEAD TRIBAL COURT HAVE SUBJECT MATTER JURISDICTION?

The parties agree that the statute governing subject matter jurisdiction is Confederated Salish and Kootenai Tribal Ordinance 36B. The applicable provisions of that ordinance provide as follows:

> (a) To the fullest extent possible, not inconsistent

with federal law, the tribes may exercise, their civil, regulatory and adjudicatory powers. To the fullest extent possible, not inconsistent with federal law, the Tribal Court may execute subject matter and personal jurisdiction. The jurisdiction over all persons of the Tribal Court may extend to and include, but not by way of limitation, the following:

(1) All persons found within the reservation.

(2) All persons subject to the jurisdiction of the Tribal Court and involved directly or indirectly in:

(i) The transaction of any business within the reservation;

(ii) The ownership, use or possession of any property, or interest therein situated within the reservation.

(iii) The entering into of any type of contract within the reservation, or wherein any aspect of any contract is

> performed within the reservation.
>
> (iv) The injury or damage to property of the tribes or a tribal member.
>
> (b) As used in this section, "person" means an individual, organization, corporation, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial activity. Nothing in this chapter waives any aspect of the tribe's sovereign immunity or related privileges.

Ordinance 36B (codified as Law and Order Code), Ch. II, Sec. 1(2). It is clear from the ordinance that this Tribal Court is to exercise civil jurisdiction "to the fullest extent possible".

As acknowledged by the Appellant, subject matter jurisdiction under this ordinance is determined by the parties and the location of the dispute. Appellant argues that since the only

party to this proceeding who is a tribal member is the decedent's mother, no jurisdiction exists in the Tribal Court. However, the definition of the term "person" is not limited to tribal members. See Law and Order Code, Ch. II, Sec. 1(2)(b). Therefore, the status of the parties as tribal members or nontribal members is irrelevant to determining subject matter jurisdiction under the provisions of Ordinance 36B.

The location of the accident was within the exterior boundaries of the Flathead Reservation. See Law and Order Code, Ch. I, Sec. 2(5). It was within the Reservation where the Appellant is alleged to have owned, used, and/or possessed a motor vehicle in a manner which led to the death of Christian Mahler.

Civil jurisdiction over the

activites of non-Indians on reservation lands presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 94 L.Ed.2d 10, 107 S.Ct.971, 14 Indian L.Rep. 1015 (1987). It is clear from the above discussion that under the Law and Order Code of the Tribes, this court has subject matter jurisdiction over this case.

A limit to the exercise of the Tribal Court's civil jurisdiction is that exercise of such jurisdiction cannot be inconsistent with federal law. Montana v. United States, 450 U.S. 544, 67 L.Ed.2d 493, 101 S.Ct. 1245, 8 Indian Law Reporter 1005 (1981) provides guidance with respect to any limiting aspects of federal law on exercise of the Tribal Court's subject matter

jurisdiction. The United States Supreme Court in that case indicated:

> ... Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. ... A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. U.S., supra, 450 U.S. at 565-566, 8 Indian Law Reporter at 1011 (1981) (citations omitted; emphasis added).

Tribal governments, like state governments, have an interest In

developing and enforcing safety standards designed to encourage attentiveness and caution on the part of all persons operating vehicles on roads open to the public within the Reservation. Estate of Bighorse, 15 Indian L. Rep. 6048, (1988), modified In part on other grounds, 16 Indian L. Rep. 6025 (1989). A Tribe's regulation of motor vehicle traffic within the exterior boundaries of a reservation directly relates to improving and protecting the health and welfare of the Tribe and its members by decreasing injuries occurring on the reservation to tribal members and to others. In this case, the Confederated Salish and Kootenai Tribes have adopted the Montana Traffic Code, with modifications. No doubt substantial tribal resources have been expended to enforce this Code, and

therefore, to maintain the health and safety of all persons found within the Reservation. The Tribal Court's exercise of subject matter jurisdiction is not inconsistent with federal law.

The fact that the decedent was not an enrolled tribal member is irrelevant in connection with this analysis. A Tribe is composed of not only enrolled members, but also the families of those enrolled members. The Tribe's interest in protecting its political integrity, economic security and the health and welfare of the Tribe as a whole includes protection of the families of enrolled members. There is no basis for denying subject matter jurisdiction to the Tribal Court in this case simply because the decedent was not an enrolled member of the Tribe.

The expressed intent of the

Confederated Salish and Kootenai Tribes is to exercise its jurisdictional powers to the fullest extent possible. See Law and Order Code, Ch. I, Sec. 2(1)(b). The Tribes have declared that the Tribal Court is required to exercise its jurisdiction to the fullest extent possible. Law and Order Code, Ch. II, Sec. 1(2)(a).

This Tribal Court has previously ruled it has subject matter jurisdiction over tort actions arising from vehicular accidents when they occur within the exterior boundaries of the Reservation and involve persons under this Court's jurisdiction. Estate of Bighorse, supra, 15 Indian L. Rep. at 6049. This Tribal Court has subject matter jurisdiction over this action.

IV. CONCURRENT JURISDICTION

Appellant argues that if this Court

finds that subject matter jurisdiction exists in the Tribal Court, such jurisdiction is concurrent with Montana State Courts. If that is the case, according to Appellant, since the Respondents opened a probate action in State Court, this action must be brought in the State Court pursuant to the Tribe's Law and Order Code.

Appellant relies upon the following section of the Law and Order Code:

> 3. ... the laws and jurisdiction of the State of Montana, including the judicial system of the State, are hereby extended pursuant to, and subject to the conditions in, the Act of the Montana Legislature of February 27, 1963, Laws of Montana, 1963, Vol.1, Chap. 81, p.170, Sections 2-1-301 - 2-1-306 MCA, to Indians within the Flathead Reservation to the extent such laws and jurisdiction relate to the subjects following: ... (h) Operation of Motor Vehicles upon Public Streets, Alleys, Roads and Highways; ...

> 4. The effectiveness of (3) above is conditioned upon the following:
>
> (a) Concurrent jurisdiction remains with the Tribal Court and in the Tribal Government (where applicable with Federal Courts) of all matters referred to in Subsection (3); and any matter initiated in either a State or Tribal Court shall be completed and disposed of in that Court, and shall not be subject to reexamination in the Courts of the other jurisdiction.

Law and Order Code, Ch. I, Sec. 2 (3,4).

Appellant's argument focuses on the institution of the State Court probate proceedings as the act which gives rise to concurrent jurisdiction. However, Appellant also acknowledges that

> the Tribal Court would not have, and does not have, jurisdiction over the estate of the decedent. The Tribal Court does not have jurisdiction over the estate of the decedent, because the decedent was not a tribal member.

Brief of Appellant, p.19. Appellant's assertion is correct. This Tribal Court only has jurisdiction to probate the estates of tribal members. Confederated Salish and Kootenai Tribes of the Flathead Reservation, Code of Domestic Relations, Ch. V, Sec. 10(1). Therefore, there is no concurrent probate jurisdiction in both State and Tribal Courts.

*****

However, this action does not relate to administration of the estate. Even if there were concurrent probate jurisdiction, Appellant's argument would fail. The action commenced in this Tribal Court does not relate to administration of the decedent's estate. It is a different type of action -- a tort action for personal injuries.

Even if Respondents were to bring

the wrongful death and survival claims in State Court, they would have to commence a separate action, pay a separate filing fee, and could not pursue those claims under the previously filed probate case. A Montana State Court, exercising probate jurisdiction would not have authority to adjudicate the wrongful death claim, since a wrongful death claim is not a part of the estate of a decedent. In Re Estate of Pegg, 209 Mont. 71, 680 P.2d 316 (1984). But see In Re Estate of Farnum, 224 Mont. 304, 730 P.2d 391 (1986). We do not have a situation where the same claims are being litigated between the same parties in two different forums. The Appellant involved in this case is not named as a Defendant in the State Court probate action.

This issue has arisen in an

analogous situation, where the jurisdiction of federal courts has been questioned in cases arising by and against estates, where probate proceedings had already been commenced in State Court. Two theories allow the federal courts jurisdiction to entertain such actions.

First, so long as the federal court does not interfere with the probate proceedings or assume control of the probate, the action can be maintained in federal court. Markham v. Allen, 326 U.S. 490, 494, 90 L.Ed. 256, 66 S. Ct. 296 (1945), rev'd in part on other grounds, sub nom, Clark v. Allen, 331 U.S. 503, 91 L.Ed. 1633, 67 S. Ct. 1431 (1946). See also, 61 ALR Fed. 536 §7[b]. The Tribal Court action here is not interfering with the State Court probate proceedings. This theory would

allow this Tribal Court action to proceed.

Second, some federal courts have adopted the distinction between actions in personam and in rem. With regard to in personam actions, both a state probate court and a federal court have been held to have concurrent jurisdiction. This enables the claimant to bring the action in either forum. See 61 ALR Fed. 536, §8. The claim in this case is an in personam claim being brought against an individual who resides within the exterior boundaries of the Flathead Reservation. Therefore, this second theory applies to allow the Tribal Court to proceed with this case.

Action Initiated in Tribal Court

The Law and Order Code section relied upon by Appellant for their concurrent jurisdiction argument

provides:

> Concurrent jurisdiction remains with the Tribal Court ... of all matters referred to in Subsection (3) [which includes operation of motor vehicles within the Flathead Reservation]; and any matter initiated in either a State or Tribal Court shall be completed and disposed of in that court ...

Law and Order Code, Ch. I, Sec. 2(4)(a) (emphasis added).

The term "initiated" is not defined by the Law and Order Code. The Appellant's view is that this claim against her was "initiated" when the probate action was commenced in State District Court.

The term "initiate" has been defined in a variety of ways.

> To start a movement. To commence something, for example a proceeding. To propose for approval.

Balentine's Law Dictionary, 3rd Ed.

(1969). Was this claim against the Appellant commenced by the institution of probate proceedings in State District Court, or was it commenced when the complaint was filed in the Tribal Court?

The phrase "initiation of proceedings" is defined as setting the machinery of the law in motion. Restatement 2d, Torts, §674, Comment a. That Comment goes on to explain that one who files a counterclaim to a cause of action is the one who "initiates" a proceeding on that claim. If Appellant's argument that suit against her in Tribal Court is barred because of the previously commenced probate action in State Court, the Restatement definition of "initiation" with respect to a counterclaim would relate back to the original filing of the action. There would be no distinction between the

original filing of the action and the filing of the counterclaim. This is not the result contemplated by the Restatement.

In this case the filing of the probate action in State Court may well have been a condition precedent to the filing of a separate action by the estate against the Appellant. Nonetheless, a separate action would have had to be brought against the Appellant for injuries based on the accident at issue. Concurrent subject matter jurisdiction for that tort action exists both in the Montana State Court and in this Tribal Court. Larrivee v. Morigeau, 184 Mont. 187, 602 P.2d 563 (1979), cert. den. 445 U.S. 964 (1980). Respondents were free to choose the forum in which this particular claim against this particular Appellant was to

be commenced. The prior probate proceedings did not involve this particular claim nor this particular Appellant. Therefore, that prior probate proceeding did not "initiate" this matter. The initiation of this claim against the Appellant relates back to the filing of the complaint with the Tribal Court, and does not relate back to the commencement of the state probate action.

Respondents were free to choose the forum in which to bring this separate tort action. No election of forum occurred until this action was filed in Tribal Court. All the parties reside on the Flathead Reservation, Appellant was served on the Reservation, and the witnesses are presumably located on the Reservation. The filing of this action in Tribal Court was appropriate.

V. PERSONAL JURISDICTION OVER APPELLANT

The Appellant contends that the Tribal Court does not have personal jurisdiction over her, or over the Respondents.

Personal Jurisdiction Over Respondents

The Respondents voluntarily subjected themselves to the personal jurisdiction of the Court by applying to the Tribal Court for the relief requested in their Complaint. This Court's personal jurisdiction over the Respondents is not an issue.

Appellant raises the argument that the Tribal Court does not have jurisdiction over the estate of the decedent, because the decedent was not a tribal member. This argument confuses the true nature of these proceedings. The Tribal Court is not being asked to exercise jurisdiction to administer the

decedent's estate. The Tribal Court is requested to entertain a tort action for personal injuries suffered by the parents of the decedent, as well as for a claim which is a claim of the decedent's estate.

Whether the Tribal Court has subject matter jurisdiction over a probate action is simply irrelevant to this inquiry. The co-personal representatives of the estate stand in the shoes of the decedent for purposes of this action. The decedent, if he had survived, could have come into Tribal Court to institute and prosecute a tort action for personal injuries. The fact that decedent did not survive does not divest the Tribal Court of personal or subject matter jurisdiction.

Personal Jurisdiction Over Appellant

The fundamental requirement for

evoking personal jurisdiction is the the existence or some relationship between the Tribe and the parties to the action such that it is reasonable for the Tribal Court to exercise control over the parties. Estate of Bighorse, supra, 15 Indian L. Rep. at 6049 (1988).

Personal jurisdiction over the Appellant in this case is governed by Tribal Ordinance 36B. Under that ordinance, personal jurisdiction extends to and includes all persons found within the Reservation. Confederated Salish and Kootenai Tribal Ordinance 36B (codified as Law and Order Code) Ch. II, Sec. 1(2)(a)(1). The Defendant, being a resident of a town which is located within the exterior boundaries of the Reservation is a person found within the Reservation.

Under Tribal Ordinance 36B, the

Tribal Court also has jurisdiction over Appellant because she is a person "subject to the jurisdiction of the Tribal Court and involved directly or indirectly in ... the ownership, use or possession of any property [her motor vehicle] ... situated within the Reservation..." Law and Order Code, Ch. II, Sec. 1(2)(a)(2)(ii).

This is not a situation where the Appellant is merely using the roadways on the Reservation to pass through the Reservation. Appellant in fact resides on the Reservation and presumably uses those roads every day. She also is benefiting from Tribal resources. She benefits from Tribal Police protection, Tribal utilities, and other resources. Therefore, there are much greater ties to Appellant than if she were merely traveling through the Reservation.

There exists a sufficient relationship between the Tribe and the Appellant such that it is reasonable for the Tribal Court in this case to exercise control over her. The Tribal Court has personal jurisdiction over the parties to this action.

VI. CONCLUSION

Based upon the foregoing, the Order of Special Judge Bonnie Combes, dated July 11, 1989 is hereby affirmed. The Tribal Court of the Confederated Salish and Kootenai Tribes have both subject matter jurisdiction and personal jurisdiction over the parties in this cause of action. This action is remanded for further proceedings.

DATED this 2nd day of February, 1990.

/s/ Charles R. Hostnik
CHARLES R. HOSTNIK
Associate Justice

I concur:

/s/ Elbridge Coochise
ELBRIDGE COOCHISE, Chief Justice

/s/ Hollis Chough
HOLLIS CHOUGH, Associate Justice

CERTIFICATE OF MAILING

I, SUSIE LOUGHLIN, CLERK OF COURT, DO HEREBY CERTIFY THAT I HAVE MAILED TRUE AND CORRECT COPIES OF THE ABOVE APPELLATE COURT ORDER TO THE PARTIES FIRST-NAMED THEREIN AT THE ADDRESSES SHOWN BY DEPOSITING SAID APPELLATE COURT ORDER IN THE U.S. MAIL, POSTAGE PREPAID AT PABLO, MONTANA ON THE DATE BELOW STATED.

LON J. DALE ESQ.
BRIAN J. SMITH, ESQ.
MILODRAGOVICH, DALE & DYE, P.C.
ATTORNEYS AT LAW
P.O. BOX 4947
MISSOULA, MONTANA 59806-4947

EDWARD R. MURPHY, ESQ.
DATSOPOULOS, MACDONALD & LIND
ATTORNEY AT LAW
CENTRAL SQUARE BUILDING
201 WEST MAIN
MISSOULA, MONTANA 59802

February 16, 1990 /s/ Susie Loughlin
CHIEF CLERK OF COURT

APPENDIX C:

OPINION AND ORDER OF

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

DATED JANUARY 29, 1993

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

****

LYNETTE HINSHAW,

Petitioner,

CV 90-71-M-CCL

-V-

GLORIA S. MAHLER and KENNETH J. MAHLER, Individually and as Person Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, DECEASED,

OPINION AND ORDER

Respondents,

and

THE CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION,

Intervenor-Respondent.

****

Before the court is Lynette Hinshaw's petition for review of the decision of the Tribal Court of the

Confederated Salish and Kootenai Tribes of the Flathead Reservation that the Tribal Court has jurisdiction over an action there pending. Petitioner moves for summary judgment and contends that as a matter of law no subject matter and/or personal jurisdiction exists in the Tribal Court over the wrongful death and survivorship claims arising out of an automobile/motorcycle collision between two non-Tribal members occurring within the exterior boundaries of the Flathead Reservation.

PROCEDURAL BACKGROUND

Respondents Gloria and Kenneth Mahler commenced an action against Lynette Hinshaw in the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("the Tribes") in which they allege that their son, Christian Mahler, was killed in an

automobile/ motorcycle collision as a result of the negligence of Lynette Hinshaw. Their suit asserts a claim for wrongful death on their own behalf and a claim on behalf of the estate of Christian Mahler for his pain and suffering and other losses. The Defendant filed a motion to dismiss for lack of subject matter and personal jurisdiction but the motion was denied by the Tribal Court. The Petitioner then filed an appeal of the Tribal Court's ruling. Pursuant to the Law and Order Code of the Confederated Salish and Kootenai Tribes, a three-judge appellate panel heard the appeal on the question of jurisdiction raised in the motion to dismiss. The Tribal Appellate Court affirmed the Tribal Court and held that the Tribal Court has both subject matter jurisdiction and personal

jurisdiction over the claims and parties in the action. Having exhausted remedies in Tribal Court, Defendant Hinshaw petitions this court to review the issue of Tribal Court jurisdiction.

FACTS OF THE CASE

The accident occurred on Montana Highway 93 in Lake County, Montana on July 4, 1986. The collision occurred within the exterior boundaries of the Flathead Reservation. The collision involved an automobile driven by Lynette Hinshaw and a motorcycle driven by Christian Mahler.

At the time of the accident, Petitioner was residing near St. Ignatius, Montana, which is located within the exterior boundaries of the Flathead Reservation. Petitioner is not a member of the Confederated Salish and Kootenai Tribes. Respondents Gloria and

Kenneth Mahler are the parents of the decedent, Christian Mahler. Gloria Mahler is a member of the Confederated Tribes. However, Kenneth Mahler is not a Tribal member and Christian Mahler was not a Tribal member.

ANALYSIS

EXHAUSTION

The first issue before the court is raised by Intervenor Tribes' contention that Petitioner has failed to properly comply with the requirement of exhaustion of tribal remedies. A federal court must stay its hand and give the tribal court the first opportunity to address the issue of tribal jurisdiction. National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987). This exhaustion requirement is based on

notions of comity and allows the tribal court to apply its special expertise in tribal matters and to develop a record to aid the federal court in making a determination should tribal jurisdiction be challenged. National Farmers Union, 471 U.S. at 857.

In this case, Petitioner appeared in Tribal Court specifically to contest its jurisdiction. The Tribal Court received briefing and heard argument before ruling that it did have jurisdiction over the matter. The matter was then properly appealed to the Tribal Appellate Court which affirmed the ruling. The Tribal Appellate Court then made a finding that Tribal remedies had been exhausted and stayed the Tribal Court proceedings until this court had an opportunity to review the jurisdictional question.

Intervenor contends that Petitioner has improperly expanded the record by submitting to this court depositions which were not before the Tribal Court. Because the underlying determinative facts are not in dispute and were presented to the Tribal Court in their entirety, the court finds no failure to comply with the exhaustion requirement on this basis.

Intervenor also contends that new arguments are raised by Petitioner in this court which were not fully developed in the Tribal Court proceedings. However, the Tribal Court is well versed in all aspects of tribal jurisdictional law and this court can safely presume that it engaged in a complete analysis of the jurisdictional issue before making its determination regardless of any attempts by Petitioner

at this juncture to modify her arguments. Therefore, the court finds, as the Tribal Court did, that Petitioner has exhausted her Tribal remedies on the jurisdictional issue.

TRIBAL SUBJECT MATTER JURISDICTION

As an initial matter, the court finds that the Mahler's appointment in state court as co-personal representatives of Christian Mahler's estate does not control the question of jurisdiction in this case. In Matter of the Estate of Farnum, 730 P.2d 391 (Mont. 1986), the Montana Supreme Court upheld the district court's decision that it had no jurisdiction over the distribution of judgment monies obtained from a wrongful death action while sitting as a probate court. Id. at 395. Because a state probate court does not have jurisdiction over a wrongful death

action, Petitioner's arguments that Gloria Mahler initiated her claims in state court by virtue of the probate proceedings are without merit.

This action was brought in Tribal Court by Gloria and Kenneth Mahler and consists of two separate and distinct claims. First, Gloria and Kenneth Mahler assert a wrongful death claim as individuals. Second, in their capacities as co-personal representatives of the estate of Christian Mahler, they have asserted a survivorship claim. It is the difference between these two claims that is the crux of the jurisdictional issue before the court.

it is a fundamental tenet of tribal sovereignty that reservation Indians have the right "to make their own laws and be ruled by them." Williams v. Lee,

358 U.S. 217, 220 (1959). In Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), the Supreme Court determined that tribal criminal jurisdiction over nonmembers is restricted. However, the same limitations do not apply in the civil arena. See National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 18 (1987). In Iowa Mutual, the Supreme Court held that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. (Citations omitted). Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." Iowa Mutual, 480 U.S. at 18. To determine the limits of tribal

jurisdiction in a given case, a court must engage in a "careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." National Farmers Union, 471 U.S. at 855-856.

Pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 et seq., the Tribes adopted a federally approved constitution that affirms the right to develop a court system. The Tribal Court's civil jurisdiction is defined by Tribal Ordinance 36-B (as amended), a federally approved set of laws and procedures entitled "The Law and Order Code of the

Confederated Salish and Kootenai Tribes of the Flathead Reservation." Under this federally approved ordinance, Tribal Court jurisdiction extends:

> 2. (a) To the fullest extent possible not inconsistent with federal law, the Tribes may exercise their civil regulatory and adjudicatory powers. To the fullest extent possible not inconsistent with federal law, the Tribal Court may exercise subject matter and personal jurisdiction. The jurisdiction over all persons of the Tribal Court may extend to and include, but not by way of limitation, the following:
>
> (1) All persons found within the Reservation.
>
> (2) All persons subject to the jurisdiction of the Tribal Court and involved directly or indirectly in:
>
> (i) The transaction of any business within the Reservation;
>
> (ii) The ownership, use or possession of any property, or interest therein, situated within the Reservation;
>
> (iii) The entering into any type of contract within the Reservation or wherein any aspect of any

contract is performed within the Reservation;

(iv) The injury or damage to property of the Tribes or a Tribal member.

Though this ordinance establishes that the Tribal Court is empowered to hear cases over which it has jurisdiction, it acknowledges that such jurisdiction cannot be inconsistent with federal law. The federal statutory law with the most impact on civil jurisdiction on the Flathead Reservation is Public Law 280.

The federal Act of August 15, 1953 (Pub.L. 83-280, 83rd Cong., 2d Sess.), 67 Stat. 588, amended Publication 90-284, 82 Stat. 73, 78, 25 U.S.C. 1321, et seq., ("PL-280"), allowed for the permissive extension of state jurisdiction over Indians residing on Indian Reservations within applicable states.

In 1963, the Montana Legislature enacted § 2-1-302, M.C.A., which provides that if the governor of the State of Montana receives a resolution from the Tribal Council of the Confederated Salish and Kootenai Tribes, or any other tribe within the state, expressing a desire that its people and lands be subject to the criminal or civil jurisdiction of the state, then the governor may issue a proclamation to that effect and such jurisdiction would apply to that land and the members residing thereon.

On May 5, 1965, the Tribal Council of the Confederated Salish and Kootenai Tribes adopted Tribal Ordinance 40-A (Revised), which provides in pertinent part:

> (1) Subject to the conditions and limitations expressed in (2) hereof, the

laws and jurisdiction of the State of Montana, including the judicial system of the state, are hereby extended pursuant to, and subject to the conditions in, the act of the Montana legislature of February 27, 1963, laws of Montana, 1973, Vol. 1, Chap. 81, P. 170, to the Indians within the Flathead Reservation to the extent such laws and jurisdiction relate to the subjects following:

(a) Compulsory school attendance;

(b) Public Welfare;

(c) Domestic Relations (exception adoptions);

(d) Mental Health, Insanity, Care of the Infirm, Aged and Afflicted;

(e) Juvenile Delinquency and Youth Rehabilitation;

(f) Adoption Proceedings (with consent of the Tribes);

(g) Abandoned . . . or Abused Children;

(h) Operation of Motor Vehicles upon the Public Streets, Alleys, Roads, and Highways;

(i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns within the Flathead Indian Reservation.

(2) The effectiveness of subsection (1) hereof is conditioned upon the following:

(a) Concurrent jurisdiction remains (where applicable with federal courts) with the Tribal Court and in the Tribal government of all matters referred to in subsection (1); and any matter initiated in either state or federal government court or the Tribal court shall be completed and disposed of in that court and shall not be subject to re-examination in the courts of the other jurisdiction.

(b) . . .

(d) All jurisdiction of the Confederated Tribes under their constitution and bylaws, and ordinances enacted

> pursuant thereto, and of the federal government under the United State Criminal code, to the extent not expressly transferred by subsection (1) hereof, remains in the Confederated Tribes and in the federal government, respectively to the same extent as if this ordinance had not been adopted.

It is clear from the preceding language that the extension of state civil jurisdiction over Tribal matters is limited to those specific matters set forth in Tribal Ordinance 40-A and does not extend beyond that. It is also clear, and Petitioner concedes, that Tribal Ordinance 40-A in conjunction with PL-280 creates a system of concurrent jurisdiction over the specified matters. The Montana Supreme Court has interpreted Ordinance 40-A and PL-280 and concluded that they work together to create concurrent adjudicatory jurisdiction over tort

claims arising out of traffic accidents involving Indians on the Flathead Reservation. Larrivee v. Morigeau, 184 Mont. 187, 602 P.2d 563 (1979).

Petitioner, however, contends that where an accident occurs on the Reservation which involves only non-Tribal members and the tort claim arising from that accident is a claim by one nonmember against another nonmember, exclusive jurisdiction over the claim lies in state court. In support of this contention, Petitioner argues that no authority exists for extending Tribal jurisdiction over claims that do not affect Tribal interests. Additionally, Petitioner argues that the Tribes do not have jurisdiction over any claim arising from an accident involving two nonmembers occurring on Reservation roadways because the Tribes have

acquiesced to state regulatory authority over motor vehicle travel on the reservation at least to the extent that Tribal members are not involved. Petitioner contends that this alleged acquiescence by the Tribes to state regulatory authority constitutes a voluntary divestiture of jurisdiction in this case.

The court need not conclusively determine the merits of these arguments, however, because Petitioner's basic assertion that only nonmembers are involved in the claims brought in Tribal Court is incorrect and fails to acknowledge the fundamental distinction between the two separate claims included in this action.

The survivorship action is unquestionably brought in a representative capacity by Gloria Mahler

as co-personal representative of the estate of the decedent, Christian Mahler. Petitioner focuses on the representative capacity in the survivorship claim and then relies on statutory provisions of Montana law to support her assertion that the wrongful death claim must also be brought in a representative capacity. Petitioner uses these Montana statutory provisions to strengthen her position that Gloria Mahler is not a real party in interest in this case but merely the representative of a non-Tribal member's estate.

Under Section 27-1-513, M.C.A., the personal representative of a decedent's estate is the designated party to maintain a wrongful death action. Additionally, under Section 27-1-501(2), M.C.A., wrongful death claims and

survivorship claims must be combined in one legal action. Therefore, under Montana law both a wrongful death claim and a survivorship claim are brought in a representative capacity.

Gloria Mahler, however, is not proceeding in state court but in Tribal court under Tribal law which does not require that a wrongful death claim be brought by the personal representative of the decedent's estate. Tribal law also does not require that a survivorship claim and a wrongful death claim be brought together. Therefore, Petitioner's argument that a wrongful death claim must be brought in a representative capacity is based only on specific statutory provisions of Montana law rather than Tribal law.

A wrongful death claim, unlike a survivorship claim, does not belong to

the decedent's estate but to the individual who has suffered the loss. Even under Montana law it is well settled that damages recovered in a wrongful death action are not part of a decedent's estate but are personal to the heirs. See Matter of Estate of Pegg, 680 P.2d 316, 321 (Mont. 1984).

Gloria Mahler's wrongful death claim is personal to her, and no provision of Tribal law requires that she bring it in any capacity other than that as an individual. Therefore, the wrongful death claim constitutes a tort action by a Tribal member for injuries personally suffered by that Tribal member as the result of an accident which occurred on the Flathead Reservation. The Tribal court has jurisdiction over the claim notwithstanding the fact that the

tribal member was not present at the scene of the accident.

Having concluded that the Tribal Court does have jurisdiction over Gloria Mahler's wrongful death claim, the court must now consider the propriety of Tribal Court jurisdiction over the survivorship claim brought by Gloria Mahler in her capacity as co-personal representative of her son's estate. Though the court recognizes the clear distinction between the two claims, the conclusion that jurisdiction over the wrongful death claim properly lies in Tribal Court must further lead to the conclusion that jurisdiction over the entire action, including the survivorship claim, properly lies in Tribal Court.

This decision is limited to the specific factual situation currently

before the court. A wrongful death claim has been brought in Tribal Court by a Tribal member asserting personal injuries as the result of an accident which occurred on the Flathead Indian Reservation. Under such a claim, Gloria Mahler's interests, and therefore the Tribes', are not minimal, tenuous, or contingent. Any recovery belongs to Gloria Mahler as an individual and not to the estate of a nonmember decedent. Therefore, no federal statute, judicial decision, treaty or executive policy acts to divest the Tribes of jurisdiction over such a claim raised in such circumstances. Though the survivorship claim is raised in a representative capacity, concerns injuries suffered by a nonmember decedent and any recovery belongs to the decedent's estate, the Tribal Court must

retain jurisdiction over it lest its authority to hear the wrongful death claim be undermined.

The court does not here decide whether the Tribal Court would retain jurisdiction over the survivorship claim had it been brought by itself. Under the specific circumstances of this case, the survivorship action has been joined with a wrongful death claim over which the Tribal Court does have jurisdiction. Therefore, the court must address the effects on that proper jurisdiction should Gloria Mahler be compelled to proceed with the survivorship claim in state court.

Exclusive state court jurisdiction over the survivorship claim in this case would place Gloria Mahler on the horns of a dilemma and force her to make a decision which could impact not only her

rights as an individual litigant but also upon the lawful authority of the Tribal Court itself. If the state is granted exclusive jurisdiction over the survivorship claim, Gloria Mahler will be forced to either split the litigation between two separate courts with the resulting increase in costs and waste of judicial resources, or take the entire action, including the wrongful death claim, into state court. Exclusive jurisdiction in state court of the survivorship claim in this situation would, therefore, constitute a de facto limitation on Tribal sovereignty by obstructing Gloria Mahler's right to proceed in Tribal Court because of practical and economic obstacles in her path.

Tribal courts have been held to play a "vital role in tribal self-

government." Iowa Mutual, 480 U.S. at 14. Furthermore, "[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and selfgovernment, the state courts are generally divested of jurisdiction as a matter of federal law." Id. at 15. In this case, exclusive jurisdiction in state court over the survivorship claim would constitute an impermissible intrusion by the state into Tribal affairs by undermining the authority of the Tribal Court to hear the wrongful death claim by effectively chilling Gloria Mahler's right to proceed in Tribal Court for that claim.

Therefore, Tribal sovereignty and judicial economy necessitate the conclusion that subject matter jurisdiction over the entire action,

including both the wrongful death and survivorship claims, lies in Tribal Court under these circumstances.

PERSONAL JURISDICTION

Petitioner also argues that the Tribal Court does not have personal jurisdiction over her in this matter. Petitioner contends that, under the minimum contacts test, personal jurisdiction can only be found where there is such a substantial connection with the forum jurisdiction that the traditional notions of fair play and substantial justice are not offended. International Shoe Company v. Washington, 326 U.S. 310 (1945). Petitioner then argues that there is no fair play or substantial justice when a non-Indian is subjected to the jurisdiction of a tribal court over which she has no control or political

input. Petitioner also believes fair play is lacking because 1) the accident did not involve a tribal member; 2) the accident was not investigated by a tribal officer; 3) the accident was investigated by Montana authorities; 4) Gloria Mahler was appointed the personal representative of Christian Mahler's estate under Montana statutory authority; 5) the highway on which the accident occurred is a U.S. highway controlled by the State of Montana; and, finally, 6) members of the tribal court had excused themselves from the matter because of their involvement with and knowledge of Gloria Mahler (who is an employee of the Tribes and works closely with tribal court). Based on this, Petitioner asserts that "it is impossible for the non-Indian Petitioner to believe that the [grant of personal

jurisdiction] to the tribal court is an exercise of fair play and substantial justice." Petitioner's Brief at 27.

Petitioner's jurisdictional arguments, while facially interesting, are without substantial merit. Not only did the accident occur within the exterior boundaries of the Flathead Reservation, but also Petitioner resides on the Reservation. Unquestionably, the Tribes' have personal jurisdiction over an individual under those circumstances. However, Petitioner argues that her status as a non-Indian prevents her from participating in Tribal government and questions the competency and neutrality of the Tribal Court. Similar arguments have become a mainstay in attacking tribal jurisdiction over non-Indians and have been consistently rejected. See, e.g. Iowa Mutual, 480 U.S. 9 (1987);

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

From all of the foregoing, the court concludes that the Tribal Court of the Confederated Salish and Kootenai Tribes has both subject matter jurisdiction over Respondents' claims and personal jurisdiction over Petitioner. Accordingly, IT IS HEREBY ORDERED that Petitioner's motion for summary judgment is DENIED.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 29th day of January, 1993.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

APPENDIX D:

MEMORANDUM

OF THE UNITED STATES COURT

OF APPEALS FOR THE NINTH CIRCUIT

DATED JUNE 17, 1994

D-1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LYNETTE HINSHAW, Plaintiff-Appellant, v. GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, Deceased, Defendants-Appellees, and CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION, Intervenor-Appellee.	)	No. 93-35199 D.C. No. CV- 90-00071-CCL MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

D-2

Appeal from the
United States District Court
for the District of Montana
Charles C. Lovell,
District Judge, Presiding

Argued and Submitted March 7, 1994
Seattle, Washington

Before: HUG, HALL, and THOMPSON,
Circuit Judges.

The issues in this case are whether the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation has (1) subject matter jurisdiction over Gloria and Ken Mahler's wrongful death and survivorship claims,
which arose from an on-reservation automobile accident involving no members of the Confederated Tribes, and (2) personal jurisdiction over Lynette Hinshaw, the tortfeasor, a non-member resident of the reservation.

The district court denied Hinshaw's motion for summary judgment and held

that the Tribal Court has personal jurisdiction over Hinshaw and subject matter jurisdiction over the Mahlers' claims. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I. SUBJECT MATTER JURISDICTION

A. Wrongful Death Claim

We review the district court's determination of jurisdiction *de novo*. FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991). The Tribal Court's interpretation of tribal law is binding on this court. Sanders v. Robinson, 864 F.2d 630, 633 (9th Cir. 1988), cert. denied, 490 U.S. 1110 (1989).

Clearly, the Tribes have not surrendered their authority to exercise jurisdiction over civil actions involving nonmembers. See Montana v.

United States, 450 U.S. 544, 565-66 (1981) (tribe retains civil authority over matters affecting the tribe); see also National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 855-56 (1985). Ordinance 40-A expressly provides that the Tribal Court and Tribal Government have concurrent jurisdiction over certain civil matters occurring on the reservation, including the operation of motor vehicles on public roads, and that all jurisdiction not expressly transferred remains with the Tribes. Tribal Ordinance 40-A (Revised) (May 5, 1965); Tribal Law and Order Code Ch. 1 § 2-3. See also Larivee v. Morigeau, 602 P.2d 563, 566-71 (Mont. 1979) (jurisdiction over torts arising from automobile accidents on the Flathead Reservation is concurrent between the State and the Tribes), cert. denied, 445

U.S. 964 (1980).

The Mahlers' action falls squarely within the scope of Tribal Ordinance 36-B. Tribal Law and Order Code, Ch. II, § 1(2) (1985). The accident occurred within the boundaries of the reservation. Gloria Mahler, Kenneth Mahler, and Hinshaw reside on the reservation and thus are "found" on the reservation, pursuant to section 1(2)(a)(1) & (2)(b). Hinshaw owned, used, and possessed a motor vehicle within the reservation, pursuant to section 1(2)(a)(2)(ii). Finally, Hinshaw's actions injured Gloria Mahler, a tribal member, pursuant to section 1(2)(a)(2)(iv).

The Tribes' jurisdiction has not been limited by treaty or statute, and the Tribes have not given up their authority to exercise jurisdiction over

actions such as the Mahlers'.

B. Survivorship Claim

The Tribal Court also has jurisdiction over the survivorship claim. Hinshaw argues that only the State has subject matter jurisdiction over the survivorship action because it is brought in a representative capacity, any damages belong to the estate, and the decedent was not a tribal member. We disagree.

The Tribal Court does not have concurrent probate jurisdiction with Montana. Tribal Appellate Court Opinion at 9, citing Tribal Code of Domestic Relations, Ch. V § 10(1). However, the Mahlers' tort action for personal injuries does not relate to the administration of the estate. A party wishing to bring both a wrongful death claim and a survivorship claim in a

Montana court must initiate a separate non-probate action. See Matter of Estate of Pegg, 680 P.2d 316, 322 (Mont. 1984) (wrongful death claim is not part of decedent's estate); Mont. Code Ann. §§ 27-1-513, 27-1-501(2) (1992) (a wrongful death claim and a survivorship claim must be combined in one legal action and brought in a representative capacity). Thus, initiation of the probate action did not initiate the Mahlers' tort actions in state court.

Furthermore, Hinshaw has cited no authority showing that the Tribal Court does not have jurisdiction over the survivorship claim. Iowa Mut. Ins. Co. v. LaPlantz, 480 U.S. 9 (1987) provides that "state courts are generally divested of jurisdiction as a matter of federal law" if the exercise of state-court jurisdiction "would interfere with

tribal sovereignty and self-government." Id. at 15. For us to hold otherwise would, in the words of the district court, "undermin[e] the authority of the Tribal Court to hear the wrongful death claim by effectively chilling Gloria Mahler's right to proceed in Tribal Court for that claim."

II. PERSONAL JURISDICTION

Hinshaw also argues that the Tribal Court lacks personal jurisdiction over her under the minimum contacts test of International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

The Tribes' own case law provides that the fundamental requirement for personal jurisdiction is the existence of some relationship between the Tribes and the parties to the action such that it is reasonable for the Tribal Court to exercise control over the parties.

Estate of Bighorse, 15 Indian L. Rep. 6048, 6049 (1988); Tribal Appellate Court Opinion at 15. This also satisfies the requirements of International Shoe. Hinshaw, by living on the reservation, has purposefully availed herself of the privilege of conducting activities in the forum. The claim arises out of her forum-related activities, and the exercise of jurisdiction is reasonable because the Tribes have a special interest in exercising jurisdiction over those who have committed tortious acts within the reservation.

III. CONCLUSION

The decision of the district court is **AFFIRMED.**